[2016] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CIVIL APPEAL NO 74/2012

BEFORE: **THE HON MR JUSTICE BROOKS JA**
THE HON MR JUSTICE WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**RANIQUE PATTERSON**	**APPELLANT**
AND	**SHARON ALLEN**	**RESPONDENT**

Debayo Adedipe instructed by Owen S Crosbie & Co for the appellant

Canute Brown instructed by Brown, Godfrey & Morgan for the respondent

13 April and 30 May 2016

BROOKS JA

[1] I have read in draft the judgment of F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

F WILLIAMS JA

Background

[2] In this appeal, the appellant seeks to challenge the order of a Resident Magistrate for the parish of Manchester made on 13 January 2016. By that order the learned Resident Magistrate refused, after an *inter partes* hearing, to set aside an order

for an interlocutory injunction in favour of the respondent that had been made *ex parte* on 19 December 2015.

[3] The claim in this matter was brought by the plaintiff/appellant (Miss Patterson), seeking damages for trespass to premises at which both she and the defendant/respondent (Miss Allen) reside, which is located at 4 Buena Vista Drive, Mandeville, in the parish of Manchester and registered at Volume 1232, Folio 766 of the Register Book of Titles (the said premises).

Summary of the plaintiff/respondent's case

[4] By way of plaint number 1187 of 2014, filed on 22 September 2014, Miss Patterson commenced the claim against Miss Allen for the sum of $1,000,000.00 for trespass. The basis of Miss Patterson's claim was her contention that Miss Allen's licence pursuant to which she had been occupying the said premises was terminated by letter dated 9 May 2014, the notice period ending on 31 July 2014. The particulars of claim stated that Miss Allen was formerly the licensee of Miss Patterson's father, before becoming the licensee of Miss Patterson herself. However, no details in relation to the circumstances surrounding the creation or existence of the licence were given.

Summary of the defendant/respondent's case

[5] The record indicates that Miss Allen filed a notice of special defence and counterclaim in response to Miss Patterson's claim on 7 January 2015. She also filed an amended defence and counterclaim on 15 January 2015. In these documents, she outlines what she gives as the circumstances in which she came to begin living in the

said premises; of the death of Miss Patterson's father and how she came to be dealing directly with Miss Patterson. On her account, she met Miss Patterson's father (Mr Ranford Patterson) in 1995 and commenced cohabiting with him in 1996 at the said premises. Her two children also lived there with them. They lived there in that arrangement until Mr Patterson died on 20 February 2014. In her view, they so lived there as man and wife, although they were not lawfully married.

[6] Based on these circumstances, she advanced a two-pronged defence: first, that she would be entitled to an interest in the said premises, as it would fall to be considered as the family home pursuant to the Property (Rights of Spouses) Act (PROSA), and as such she would presumptively be entitled to a half share pursuant to the said Act. Second, on the basis of an equitable interest or right in the said premises, she contended that Miss Patterson holds a half share in the said premises on constructive trust for her, Miss Allen.

[7] In an affidavit filed in support of her application for an injunction (which will be further discussed, later in this judgment), Miss Allen deposed that she learnt that Mr Patterson had, shortly before his death, transferred to Miss Patterson, his daughter, all his interest in the said premises. She only learnt of this when she was served with the documents in this claim. She is of the view that this was done with a view to defeating her interest in the said premises. She contends that the said transfer is fraudulent. Additionally, the deceased (she further contends) had confirmed his gift to her of the said premises, among other things, by way of letter dated 26 January 2009.

[8] Miss Allen has also sought a declaration in the Supreme Court that she is the spouse of Mr Patterson. This she has done by way of claim number HCV 03100 of 2014.

The plaintiff/appellant's reply

[9] In her reply filed 19 January 2015, Miss Patterson denied Miss Allen's contentions as to a legal or equitable interest in the said premises; and indicated that she would be relying on sections 68 and 70 of the Registration of Titles Act (the RTA).

[10] Miss Patterson further averred that her father transferred the said premises to her by way of an instrument of transfer dated 14 November 2012 and registered on 12 March 2013, which registration is protected by the said sections of the RTA. (Documentary proof of this does not form part of the record.)

The ex parte application for an injunction

[11] By means of a document headed "Ex parte Application for Interim Injunction & Interim Order" dated 16 December 2014, Miss Allen applied for an injunction and an order in the following terms:

> "1. That an Interim Injunction be granted to restrain Defendant/Respondent, his [sic] servants and/or agents from carrying out acts in relation to all that parcel of land registered at Volume 1232 Folio 766 in the Register Book of Titles being all that parcel of land of Woodlawn in the parish of Manchester being lot numbered Four on the plan of Woodlawn calculated to interfere with the quiet enjoyment of the said premises or to compel her to deliver up possession thereof.
>
> 2. That an Interim Order be made requiring the Defendant/ Respondent to permit the Applicant/Defendant to establish an account with the Jamaica Public Service in

> her name to provide electricity for the said premises until the disposal of the said aforementioned matter or to cause electricity to be reconnected to the said premises."

[12] Miss Allen's affidavit in support of the application, sworn to on 15 December 2014, outlined the history of the matter, already mentioned in the summary of the particulars of claim, reply and defence. Further, she averred that in the year 2007, Mr Patterson became unable to walk without assistance as a result of illness and suffered from Alzheimer's disease.

[13] The event that apparently was the immediate trigger for the application was also mentioned. Reference to that event is contained in paragraph 12 of her said affidavit. In that paragraph, she deposes:

> "12. That on the 9th December 2014 members of the Jamaica Public Service Company entered the said premises upon the instructions and/or request of the Plaintiff/Respondent and removed the meter and all connections for electricity from the premises."

[14] She further deposes to reporting the incident to the police and avers that the actions were in breach of her right to quiet enjoyment of the said premises.

The ex parte orders of the court

[15] On 19 December 2014, after an *ex parte* hearing, the learned Resident Magistrate made the following orders:

> "1. That an interlocutory injunction be granted to restrain the Respondent/Plaintiff and/or her servants from entering the dwelling house and all that parcel of land at Lot numbered 4 on the plan of Woodlawn in the

parish of Manchester being all that parcel of land registered at Volume 1232 Folio 766 of the Register Book of Titles until the determination of this Matter.

2. That Respondent/Plaintiff and/or her servants restrain [sic] from interfering with the occupation and quiet enjoyment of the dwelling house of the Applicant/Plaintiff, her lawful visitors, and her servants and/or agents on all that parcel of land at Lot numbered 4 on the plan of Woodlawn in the parish of Manchester being all that parcel of land at Lot numbered 4 on the plan of Woodlawn in the parish of Manchester being all that parcel of land registered at Volume 1232 Folio 766 of the Register Book of Titles until the determination of this Matter.

3. That the Jamaica Public Service enter into contractual relations with the Applicant/Defendant for the provision of electricity to the dwelling house on all that parcel of land at Lot numbered 4 on the plan of Woodlawn in the parish of Manchester being all that parcel of land registered at Volume 1232 Folio 766 of the Register Book of Titles until the determination of this Matter."

The application to set aside

[16] Miss Patterson, being aggrieved by these orders (the formal order embodying them having been served on her attorney-at-law on 23 December 2014), on 5 January 2015, filed an application to have them set aside.

[17] In respect of the grounds on which the application to set aside the orders was based, it will be sufficient for the time being to say that they are the same grounds that form the basis of this appeal; and they will be set out when the grounds of the appeal are being dealt with. The points taken were largely jurisdictional in nature.

[18] The learned Resident Magistrate refused to set aside the orders that he had made *ex parte* and ruled that the orders should remain in force until the matter was determined.

Reasons for decision

[19] In his written reasons for refusing to set aside the *ex parte* orders (to be found at pages 45-46 of the record), the learned Resident Magistrate indicated a number of factors that guided his consideration and ultimate decision. These were among the reasons that he gave:

i) That the purpose of an interlocutory injunction was to preserve the status quo.

ii) In deciding whether to grant an injunction, the court had to be guided by the case of **American Cyanamid Co v Ethicon Ltd** [1975] AC 396.

iii) The actions of the plaintiff were seemingly designed to disturb the status quo while the matter was before the court.

iv) The court's decision was based on equity, the balance of convenience and a desire to maintain the status quo.

v) In relation to the duration of the injunction, the substantive matter was to be heard in no less than two weeks' time.

vi) Formal objections taken by counsel for the plaintiff were rejected as minor and not sufficient to make the *ex parte* order void.

Notice and grounds of appeal

[20] The notice of appeal in the matter was filed on 13 January 2014 – that is, the very same day on which the court below refused to discharge the *ex parte* orders. Detailed grounds of appeal were filed 4 March 2014. The main contention in the grounds of appeal is that the court below had no jurisdiction to make any of the injunctive orders that it did. These are the remaining grounds:

> "1. The judge erred in law in material respects in refusing the application to set aside his order.
>
> 2. The judge disregarded the proven facts and the law in favour of the granting of the application.
>
> 3. The judge demonstrated real bias against the Applicant/Appellant throughout the proceedings.
>
> 4. The judge had no legal justification whatsoever to refuse the application for him to set aside his order with costs.
>
> 5. The judge misinterpreted relevant and most material laws in support of the application treating for example, his Order against the absolute right of the registered proprietor, Plaintiff/Applicant under the Registration of Titles Act against the Respondent, who has not demonstrated any interest whatsoever to protect, not giving any undertaking for damages and executed an Order which does not contain the penal clause and making a long injunction ex parte, inter alia."

The submissions on appeal

For the plaintiff/appellant

[21] A number of arguments and submissions were made by way of the skeleton submissions dated 4 March 2015 and filed in the court below. These were supplemented and developed by way of oral submissions made by Mr Adedipe for Miss Patterson. These arguments and submissions may be summarized as follows:

1. There was no justification for the court below not to have set the *ex parte* orders aside, as they were made without jurisdiction.
2. The court below was in error in granting a "long injunction" when the application was for a "short" or *ex parte* injunction.
3. Miss Allen has no defence to Miss Patterson's claim and is seeking in the Supreme Court an order declaring her to be a spouse in an effort to establish a defence.
4. The court below erred in viewing the injunction granted as a short injunction in light of the fact that the trial of the substantive matter was set for 20 January 2015 - that is, about seven days away.

For the defendant/respondent

[22] On behalf of Miss Allen, Mr Brown sought to dissuade the court from accepting any of the arguments or submissions made in the case on behalf of Miss Patterson. He

submitted that the circumstances and the affidavit evidence that were before the court entitled the court to make the orders that it did. The substantive action essentially sought to recover possession, albeit it was brought in trespass and that in such circumstances the provisions of the statute (the Judicature (Resident Magistrates) Act) (the JRMA) could not be ignored.

[23] He further asserted that a party is able to seek an injunctive remedy even when there is no substantive case before the court.

[24] Counsel contended that the property in dispute might be regarded as the matrimonial home within the meaning of PROSA and there seems to have been at least a five-year period during which they cohabited, on the basis of which, under the Act, she could be regarded as a spouse, they having actually cohabited for some 14 years.

[25] Additionally, counsel submitted that the court below, on hearing the application, was empowered pursuant to Order xi, Rule 7(c) of the Resident Magistrates Court Rules (the Rules), to have made the order absolute, unless cause was shown to the contrary. Further, as was implicit in the order made by the Resident Magistrate, the respondent could have applied to vary the order and was heard at the application to set aside the grant of the injunction.

[26] Counsel also submitted that at the hearing to set aside, the matter had been fully ventilated and the Resident Magistrate had not breached any of the rules. Counsel argued that, in any event, even if there had been a failure of the learned Resident

Magistrate to comply with the Rules (regarding the absence of a penal notice and matters of form), Order xxxvi, rule 23 indicates that non-compliance does not render the proceedings void unless the court so directs. In these circumstances, where complaints of irregularity had been aired at the *inter partes* hearing, it was within the discretion of the learned Resident Magistrate whether to have set aside or adjusted the order. The learned Resident Magistrate having, in the exercise of that discretion, decided not to do so, in light of the guidance of **Hadmor Productions Ltd and another v Hamilton and others** [1982] 1 All ER 1042, this court should not lightly interfere with that exercise of the learned Resident Magistrate's discretion.

Issues

[27] It seems to me that the issues that might be identified for discussion might shortly be stated to be as follows:

(i) Whether the court below erred in granting the injunction *ex parte*;

(ii) whether the court below erred in granting an interlocutory injunction at a hearing of an application for an interim injunction;

(iii) whether there was sufficient basis for the grant of an injunction;

(iv) whether the orders of the court below should be set aside.

Discussion

Issue (i): Whether the court below erred in granting the injunction ex parte

Issue (ii) whether the court below erred in granting an interlocutory injunction at a hearing of an application for an interim injunction

Issue (iii) whether there was sufficient basis for the grant of an injunction

[28] The modern approach to the grant of *ex parte* applications for injunctions is regarded as that to be found in the case of **National Commercial Bank Jamaica Limited v Olint Corp. Limited**, Privy Council Appeal No 61 of 2008, an appeal from this court, in which at first instance, Jones J (as he then was) had granted an injunction *ex parte*.

[29] These were the observations of the Board, delivered by Lord Hoffmann, at paragraph 13 of their lordships advice:

> "13. First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

[30] Over the years and even before this decision, this approach has been taken in a number of cases and in a number of courts, including those cases that were cited on behalf of the respondent at the application to discharge the *ex parte* injunction. So that, for example, in the case of **Bates v Lord Hailsham** [1972] 1 WLR 1373, Megarry J observed at page 1380 B-C:

> "Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion."

[31] Similarly, in a case referred to on behalf of the appellant – **Inglis & McCabe v Granburg** (1990) 27 JLR 107 – Downer JA is reported at page 109 E-F as stating that:

> "Interim injunctions belong to that exceptional category of remedies which are granted in the absence of the defendant. In exercising its discretion to grant such a remedy an essential prerequisite was that the matter was of such urgency that there was no time to serve the defendant. In exceptional cases the certainty of success at the interlocutory stage may persuade the Court to grant the remedy where urgency is not established, but this must be a rare event. Generally speaking, the time granted for these injunctions is between five and seven days."

[32] It is clear from the discussion of these cases that the grant of an injunction on an *ex parte* application was, in light of the current learning, unusual. It might be said to be unusual as well for an interlocutory injunction (normally granted at an *inter partes* hearing until the substantive matter is tried) also to have been granted on an *ex parte* application for an interim injunction. But can it properly be said that the learned Resident Magistrate had no jurisdiction at all to have done so? In seeking to answer this question and ultimately to ascertain whether the learned Resident Magistrate's orders

ought to be disturbed by this court, it may be useful to remember the factual context in which this matter was dealt with.

[33] The *ex parte* orders were made on Friday 19 December 2014 – on the cusp of the yuletide season, when customarily, there is a scaling down of business activities in offices, some even being closed. The application was made primarily on the basis of the allegation that Miss Patterson, who was in effect seeking to recover possession from Miss Allen, in an effort to hasten her departure, had caused her electricity supply to be disconnected. Miss Allen therefore, for all practical purposes, faced the prospect of a dark Christmas season. The matter was also set for trial on 20 January 2015. The application to set those orders aside was heard *inter partes* on 13 January 2015, when the court below refused the application and ordered that the injunction should run until the matter was determined.

[34] At the time the matter was heard *inter partes* it should be noted that a defence (filed 7 January 2015) would also have been on the court's file, seeking to set up the defences already mentioned in paragraph [6] of this judgment.

[35] In relation to the defence that Miss Allen sought to establish pursuant to PROSA, it is useful to give brief consideration to section 8 thereof at this juncture; in particular section 8(1)(b) and (3)(c). The relevant sections read as follows:

> "8. – (1) Where the title to a family home is in the name of one spouse only then, subject to the provisions of this Act –

...

(b) any transaction concerning the family home shall require the consent of both spouses.

...

(3) Where one spouse enters into a transaction concerning the family home without the consent of the other spouse then-

(a) subject to paragraph (b), that transaction may be set aside by the Court on an application by the other spouse if such consent had not been previously dispensed with by the Court.

(b) paragraph (a) shall not apply in any case where an interest in the family home is acquired by a person as bona fide purchaser for value without notice of the other spouse's interest in the family home."

[36] On the face of the affidavit evidence; the defence; the existence of the claim in the Supreme Court seeking that she be declared Mr Patterson's spouse and the submissions that were before the court below, Miss Allen would clearly appear to have been in a position to attempt to avail herself of the rights conferred by section 8 of the Act and to be entitled to seek to establish or assert a defence based on its terms.

[37] Against the background of these rights that Miss Allen appeared to have been entitled to or to have enjoyed, Miss Patterson, on Miss Allen's evidence, was seeking to truncate the process for going through the courts to evict her by deliberately and unlawfully interfering with her peaceable enjoyment of the premises.

[38] It was that *prima facie* unlawful act that Miss Allen sought to restrain Miss Patterson from doing, whilst she (Miss Allen) went about seeking to obtain a declaration that she was Mr Patterson's spouse with a view to assisting her in putting forward her defences under PROSA and in equity.

[39] In fact, when one looks at the paragraph in Miss Patterson's particulars of claim that appears immediately before the prayer, one sees that Miss Patterson is saying that Miss Allen was claiming half the value of the house. This, a part of her case, shows that Miss Patterson would have been aware that there was a claim to some interest in the property and that Miss Allen would not be accepting her characterization as a licensee.

[40] It was in this factual matrix that the court below made the orders – in particular the order for the interlocutory injunction. In these circumstances it could not reasonably be asserted or accepted that the court would have had no jurisdiction to have granted the prohibitory injunction that it did.

[41] So that, although it is my view that: (i) it ought not to have been granted *ex parte*; and (ii) it ought not to have been granted as an interlocutory injunction when an application for an interim injunction was being made, there was sufficient evidential material before the court below for it: (a) to have granted the prohibitory injunction that it did; and (b) for it to have refused to discharge the *ex parte* orders, and to have continued the interlocutory injunction, given the fact especially that the trial was set to be held about seven days thereafter.

[42] There are other considerations as well emanating from the particular orders in the Rules referred to by Mr Brown on Miss Allen's behalf. For one, the terms of order xi, rule 7(a) and (c), which deal with the making of interlocutory applications, read as follows:

> "(a) The application may be made either in or out of Court, and either ex parte or on notice in writing; when made on notice, the notice shall be served on the opposite party two days at least before the hearing of the application, unless the judge gives leave for shorter notice.
>
> ...
>
> (c) The Judge upon the hearing or adjourned hearing of the application may make an order absolute in the first instance, or to be absolute at any time to be ordered by him, unless cause be shown to the contrary, or may make such other order, or give such directions as may be just." (Emphasis added).

[43] In light of what I consider to be the clear terms of these provisions of the rules, I must accept the submissions of Mr Brown that they empowered the court below to have made the interlocutory orders that were made and to have done so *ex parte*, the prevailing practice notwithstanding.

[44] However, it is important as well to set out in full, order xxxvi, rule 23 also cited by Mr Brown for Miss Allen, which set out the consequences of non-compliance with rules of practice. This is how the rule reads:

> "23- Non-compliance with any of these Rules or with any Rule of Practice for the time being in force shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise

> dealt with in such manner and upon such terms as the Court shall think fit."

[45] The effect of this rule is that, although there might have been breaches of rules of practice reflected in the way in which the court below treated with the *ex parte* application, those breaches did not render the proceedings ineffectual or a nullity. They could only have been so regarded if the court below had so declared them at the *inter partes* hearing. The court below, in the exercise of its discretion, not having done so, the orders, though less than perfect, still subsist and have force and effect.

Sections 68 & 70 of the Registration of Titles Act

[46] In relation to Miss Patterson's attempt to rely on sections 68 and 70 of the RTA, it suffices to say that, in a nutshell, these sections speak to the indefeasibility of a registered title, except in cases of fraud. On the face of section 8 of PROSA, however, there is no apparent restriction on the right that that section gives to apply to set aside a transaction that is proven to have been made to defeat a spouse's interest. Nothing in PROSA suggests that the power given in section 8 is limited, for example, to unregistered land. In any event, however, it was not for the court below to have conducted a minute analysis of and determined issues concerning the interplay between PROSA and the RTA at either the *ex parte* or *inter partes* hearing. Neither is that the role of this court on this application. A similar observation is made in respect of the roles of both the court below and this court in respect of considerations such as the interaction between the claim in the Resident Magistrate's Court and the claim in the

Supreme Court for Miss Allen to be declared a spouse. The focus was on the principles outlined in the **American Cyanamid** case and the preservation of the status quo.

The mandatory injunction

[47] There is one part of the orders made, however, that is a cause for concern: that is, the order which, it appears, sought to compel the JPS to enter into contractual relations with Miss Allen.

[48] There are a number of issues that this order raises: for one, JPS is not a party to the suit; and such orders are usually made in respect of persons who are before the court. In this regard, it is stated at **Halsbury's Laws of England**, 4th edition, Volume 24, paragraph 1045, that:

> "...Although an injunction will not as a general rule be granted against a person who is not a party to the action[4], even if he attends court[5], yet it may be granted against a person claiming title under an order made in the action." (Emphasis added).

[49] Based on this learning, it is clear that the final order couched in the language of a mandatory injunction, ought not to have been made. What would have been preferable is the language in fact used in the application for the said order, which read:

> "2. That an interim order be made requiring the Defendant/Respondent to permit the Applicant/ Defendant to establish an account with the Jamaica Public Service in her name to provide electricity for the said premises until the disposal of the said aforementioned [sic] matter or to cause electricity to be reconnected to the said premises."

[50] Or, simply an order stating that Miss Allen was at liberty to enter into the said contractual relations.

The absence of the undertaking as to damages

[51] There can be no doubt that it is customary for an applicant for an injunction to give an undertaking as to damages. That is, the applicant should undertake to be bound by any order as to damages that the court may make if it turns out that the injunction ought not to have been granted, and that its wrongful grant occasioned damage to the respondent. However, it is also observed in **Halsbury's Laws of England**, 4th edition, volume 24, paragraph 1074, that:

> "1074. ...The court may dispense with the undertaking, but will only do so in very special circumstances, such as when the order is in the nature of a final order and is not intended to be open to review at any time afterwards[2]."

[52] As in the case with the other breaches of the rules of practice, it seems to me that this breach as well would not render the grant of the injunction ineffectual. After all, the person to whom the injunction was granted might still be pursued for compensation by a respondent who could establish that he/she suffered damage by the wrongful grant of an injunction, whether or not the undertaking was given.

[53] The view by the court below of the importance and necessity for an undertaking in damages would also have been influenced by the particular facts and circumstances of this case. These particular facts and circumstances include the considerations that: (i) the applicant for the injunction was a long-standing occupant or resident of a portion of the said premises; (ii) she was attempting to advance an arguable defence, asserting

that she had an interest in the said premises; (iii) on the allegations in the particulars of claim, she had enjoyed the use of electricity at the premises for the duration of her stay there; (iv) in the course of what amounted to proceedings to evict her, and before the court could pronounce on the validity or otherwise of the claim, the electricity supply to the portion of the premises she occupies was disconnected (she contends, by Miss Patterson) in an apparent attempt to hasten her departure; (v) (this contention of causing Miss Allen's electricity supply to be disconnected was not denied by Miss Patterson at the *inter partes* hearing, the thrust of her arguments relating to legal matters); (vi) no evidence appears to have been put before the court below indicating a challenge to Miss Allen being declared Mr Patterson's spouse. In these circumstances, one can understand why the first reason stated by the court below for its decision not to set the *ex parte* orders aside, was its desire to maintain the status quo. Additionally, that desire and the circumstances from which it arose give rise to the questions as to: (i) what damage Miss Patterson could possibly suffer if it turns out that the injunction ought not to have been granted; and (ii) whether an undertaking in damages would really have been necessary in these particular circumstances.

The absence of the penal notice

[54] Yet another challenge raised in respect of the proceedings on behalf of Miss Patterson was that the absence from the order of a penal notice also rendered the order defective and was a proper basis for the *ex parte* orders to have been set aside.

[55] I respectfully disagree with this submission. The taking of this point would appear to be premature. Whilst it might be a ground for challenge if the terms of the injunction should be disobeyed and contempt proceedings are commenced, it is difficult to see how the absence of a penal notice could be used as a basis for saying that the orders themselves are of no effect. The penal notice is designed to benefit the recipient of the order. It warns him of the possible result of a disobedience of the order.

Issue (iv) whether the orders of the court below should be set aside

[56] In all the circumstances, although there were omissions to follow rules of practice in dealing with this matter by the court below, it is important to bear in mind the limits within which this court must operate in conducting a review of this matter. The test in the case of **Hadmor Productions Ltd** is well known and is to be found in the words of Lord Diplock, at page 1046, a - e of the judgment:

> "…it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction **the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it**

was based upon a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own." (Emphasis added).

[57] There can be no denying that mistakes were made by the court below in the handling of this matter; and to address that and avoid a recurrence, it may be best that the following few words of guidance be given:

(i) In keeping with the learning in the **Olint** case, it is only in cases of extreme urgency and where the giving of notice would likely defeat the objective of getting the injunction, that an application for an interim or interlocutory injunction should be heard

where no notice of the application has been given to the other side.

(ii) If granted *ex parte*, an interim injunction should be limited to last for only a few days or only so long as is necessary, with the application for an interlocutory injunction being heard *inter partes*.

(iii) As it is customary to have an applicant for an injunction give an undertaking as to damages, if this practice is to be departed from, it is best to note the thinking informing the decision to depart from the general rule, in the court's reasons for its decision.

Conclusion and Disposition

[58] However, having regard to the above-stated test in **Hadmor** and to all the facts and circumstances of this case, I find myself unable to say that the grant of the injunction and the refusal of the court below to set aside the *ex parte* orders made was: "so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it..." (per Lord Diplock in **Hadmor**).

[59] In the result, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

EDWARDS JA (AG)

[60] I too have read in draft the judgment of F Williams JA and agree with his reasoning and conclusion. I have nothing further to add.

BROOKS JA

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.